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No. 05-1606

In the Supreme Court of the United States

ANR PIPELINE COMPANY, *et al.*,

Petitioners,

v.

LOUISIANA TAX COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF THE COUNCIL ON STATE TAXATION, THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AND THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Louisiana violated the interstate pipelines' right under the Due Process Clause to a "clear and certain remedy" for the payment of an unconstitutional tax when Louisiana refused to refund the tax unlawfully collected, and instead, in order to lessen or eliminate the refund, ordered a *de novo* re-valuation of taxpayers' property by 52 local assessors.

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INTEREST OF THE AMICI CURIAE

The Council On State Taxation ("COST") is a non-profit trade association whose members include 570 of the largest corporations in the United States.[1] COST's mission is to preserve and promote equitable and nondiscriminatory state and local taxation of multistate business entities. COST's members include companies from every segment of the economy; they conduct business in every State and between every State. These companies often bear the economic burden of state and local taxes that discriminate against interstate commerce. The Louisiana courts in this case devised a new method to impede companies burdened by such taxes from obtaining the refunds required by this Court's decisions interpreting the Due Process Clause. This decision, if permitted to stand, threatens to undermine the constitutional protections on which COST's members rely. COST therefore has a strong interest in the issue presented in this case

The Interstate Natural Gas Association of America ("INGAA") is a nonprofit trade organization whose members include virtually every major interstate natural gas transmission company operating in the United States. INGAA's members account for over 95% of all natural gas transported and sold for resale in interstate commerce, through a network of 180,000 miles of pipelines. State taxing authorities consistently find interstate pipelines and gas company property an irresistible target for taxes that impose disproportionate burdens on interstate and out-of-state business in violation of the Constitution. INGAA accordingly has a very substantial interest in the proper definition of the States' due process obli-

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

gation to provide a retroactive remedy when taxes are found to violate the Constitution.

The Louisiana Association of Business and Industry ("LABI") is a professional association of over 3,000 business and industry members which represents the business interests of its members before the Louisiana state legislature, regulatory boards, and courts. LABI's members have a substantial interest in ensuring that they receive the retroactive remedy required by the Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves Louisiana's failure to abide by this Court's repeated admonition that due process requires States to provide a "clear and certain" remedy to victims of unconstitutional taxation. *McKesson Corp.* v. *Div. of Alcoholic Beverages*, 496 U.S. 18, 39 (1990); see also *Reich* v. *Collins*, 513 U.S. 106, 111 (1994); *Newsweek, Inc.* v. *Florida Dep't of Revenue*, 522 U.S. 442 (1998) (per curiam).

Louisiana imposed a facially discriminatory tax, assessing *intra*state pipelines at 15% of fair market value, and *inter*state pipelines at 25% of their fair market value. After the tax was invalidated – more than ten years after the first payment under protest – the Louisiana courts imposed a new limitation on petitioners' refund. They required onerous reassessments of petitioners' property instead of simply refunding payments in excess of the amount due under the lower tax rate applicable to intrastate pipeline property. Louisiana took the "clear and certain" remedy of a full refund, and replaced it with a series of burdensome, costly, and uncertain obstacles: reassessment of taxpayers' property by 52 local assessors.

The same motivation that drives States to impose taxes that are offensive to the Constitution – the ability to favor parochial interests by burdening out-of-state interests unrepresented in the state's political process – impels them to avoid providing their victims with clear and certain remedial relief. If this Court permits Louisiana's unjustified reassessment requirement to stand, other States likely will seize upon this approach to impermissibly restrict their refunds and institute their own, improper re-valuation schemes. In the face of costly re-valuation processes that do not result in full refunds, taxpayers will be less inclined to challenge discriminatory taxes in the first place. And having identified a new way to keep more of the proceeds of discriminatory taxes that ul-

timately are invalidated, States' enthusiasm for imposing discriminatory taxes will grow.

Other state courts have rejected procedural inventions indistinguishable from the one imposed by Louisiana, recognizing that this Court's decisions in *McKesson*, *Reich*, and *Newsweek* forbid the use of such "bait and switch" tactics with respect to remedies mandated by the Due Process Clause. The Court should grant review to eliminate these disparate approaches and reaffirm the importance of this fundamental constitutional protection.

Review is especially appropriate in this case, because the Louisiana court's decision increases the economic burden discriminatory taxation places on the natural gas industry, resulting in higher energy costs, reduced pipeline investment, and frustration of the nation's energy policy. Because natural gas companies have already made significant, immovable pipeline investments, States are irresistibly drawn to favoring their own pipelines and holding the interstate pipelines hostage with discriminatory taxes. This imposes an enormous economic burden on the natural gas industry, a burden that is borne ultimately by consumers who must pay both higher natural gas prices to heat their homes and higher prices for goods produced using natural gas. Knowing that States are free to withhold refunds of such discriminatory taxes makes further investment in pipelines unattractive, risking even higher gas prices and lower reliability of service, and threatening a critical aspect of our Nation's energy policy.

ARGUMENT

LOUISIANA'S ATTEMPT TO CIRCUMVENT THE REMEDIAL OBLIGATION IMPOSED BY THE DUE PROCESS CLAUSE PRESENTS A SIGNIFICANT QUESTION THAT WARRANTS REVIEW BY THIS COURT.

A. The Decision Below Conflicts With Decisions of This Court and Other State Appellate Courts On A Recurring Question Of Substantial Importance – The Contours Of The States' Obligation To Provide Retroactive Relief For Unconstitutional Taxes.

1. This Court has long recognized that the States have built-in incentives to enact laws that discriminate against out-of-state interests – including discriminatory taxes. See, *e.g.*, *S. Pac. Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945) ("to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940) ("Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.").

The federal Constitution's protections against this discrimination – the Equal Protection Clause, the Due Process Clause, and the Commerce Clause – thus counterbalance the State's "strong political motives to engage in discriminatory taxation." Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1833 n.569 (1991); see also David P.

Currie, *The Constitution in the Supreme Court*, 37 CATH. U.L. REV. 39, 61 (1987) ("Since geographical outsiders have no vote, they are in special need of constitutional protection. * * * [T]his approach also helps to explain the Court's long-standing insistence that interstate commerce may not be subjected to discriminatory burdens."); Donald H. Regan, *The Supreme Court and State Protectionism*, 84 MICH. L. REV. 1091, 1092 (1986) (describing states' motives for protectionism, and this Court's concern with "preventing states from engaging in purposeful economic protectionism").

To ensure that these constitutional protections in fact fulfill their role, "the Court has scrutinized claims that a tax discriminates against interstate commerce with considerable vigilance." Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation*, ¶4.13 (2000). And the long litany of decisions by this Court and other courts in recent years holding discriminatory state taxes unconstitutional confirms the continued importance of that vigilance. *E.g.*, *S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999); *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996); *McKesson*, 496 U.S. 18; *Am. Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch.* v. *State Tax Commn.*, 429 U.S. 318 (1977); *Beskind* v. *Easley*, 325 F.3d 506 (4th Cir. 2003); *Birth Hope Adoption Agency, Inc.* v. *Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040 (9th Cir. 2000); *In re the Appeal of CIG Field Servs. Co.*, 112 P.3d 138 (Kan. 2005); *Northwood Constr. Co.* v. *Twp. Of Upper Moreland*, 856 A.2d 789 (Penn. 2004) (local tax); *Simon Aviation, Inc.* v. *Indiana Dep't of Revenue*, 805 N.E. 2d 920 (Ind. Tax Ct. 2004); *Ala. Alcoholic Beverage Control Bd.* v. *Henri-Duval Winery, L.L.C.*, 890 So. 2d 70 (Al. 2003); *D.D.I., Inc.* v. *State*, 657 N.W.2d 228 (N.D. 2003); *Chapman* v. *Comm'r of Revenue*, 651 N.W. 2d 825 (Minn. 2002);

Tenn. Gas Pipeline Co. v. *Urbach*, 750 N.E.2d 52 (N.Y. App. 2001).

Just as important as the substantive constitutional principles cabining the States' taxing authority are the remedial principles governing suits challenging unconstitutional exactions. This Court recognized in *McKesson* that, in order to enable the States to protect their "exceedingly strong interest in financial stability," States are not required to permit the taxpayer to litigate the validity of a tax before requiring payment. 496 U.S. at 37. But to satisfy due process, the Court unanimously concluded, a State must provide not just a post-payment opportunity to challenge the legality of the tax "but also a *'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one*." *Id.* at 39 (citation omitted; emphasis added).

Indeed, this remedy is essential to vindicate the substantive constitutional guarantees. If a State were not required to provide a full retroactive remedy, States would have a positive incentive to enact unlawful exactions because such measures would benefit the State's citizens by permanently exporting the economic burden of any discriminatory levies that the State managed to collect before the tax was invalidated and by permanently insulating in-state interests against an equivalent economic burden for the period the tax was in effect. Discriminatory taxes subsequently held unlawful would not simply be cost-free – they would confer a positive economic benefit to the States.

And the amounts of money involved can be substantial. Here, for example, one of the petitioners began paying taxes under protest in 1994, yet the decision holding the tax unlawful was not rendered until ***2005***. Pet. App. 7a n.4.

The obligation to provide an effective remedy is therefore critical to counterbalance the States' inherent incentives to adopt these illegal exactions. "Remedies for unconstitutional

taxes are needed not only because of the moral imperative of compensating taxpayers whose funds have been taken in violation of the Constitution, but also because of the instrumental need to deter states from exacting unconstitutional taxes in the future." John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 CONN. L. REV. 73, 79 (2000).

An effective remedy also is essential to provide an incentive for taxpayers to challenge unlawfully discriminatory taxes in the first place. Mounting a legal challenge to a discriminatory tax is costly; taxpayers may litigate for years to obtain a final decision regarding the legality of a tax – virtually always in the often-not-hospitable courts of the State that imposed the levy (because of the limits on federal courts' jurisdiction imposed by the Tax Injunction Act, 28 U.S.C. § 1341). If at the end of this struggle a State may avoid providing effective retroactive relief, taxpayers will have a significantly reduced incentive to challenge unlawful taxes.

2. The Court has recognized the importance of an effective remedy – both as an independent requirement of due process and to promote vindication of the underlying constitutional protections against discrimination rights – through its decisions in *McKesson* and in *Reich*. In *McKesson*, the Court emphasized that when a State requires payment of a tax without providing the taxpayer with an opportunity to contest the constitutionality of the exaction, and the tax subsequently is adjudicated unlawful, the State has deprived the taxpayer of its property without due process, and therefore must "provide a 'clear and certain remedy' for the deprivation of tax moneys in an unconstitutional manner." 496 U.S. at 51. The Court analogized the payments of an unconstitutional tax to "real property unlawfully taken or criminal fines unlawfully imposed." *Id.* at 52 n.35.

Where a tax is invalid because it is "beyond the State's power to impose," due process requires the State to provide a refund. 496 U.S. at 39. Where the tax is unconstitutional

because it discriminates against interstate commerce, the State may choose to provide a full refund; it may cure the discrimination by refunding to the victim of the discrimination "the difference between the tax it paid and the tax it would have been assessed" under the standard applicable to the beneficiaries of the discrimination; or "to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from [the beneficiaries of the discrimination] * * *, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *Id.* at 40. The State even may employ a combination of the latter two approaches "as long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce." *Id.* at 40-41; see also *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100-101 (1993) (summarizing *McKesson*'s remedy requirement).

The Court's decision in *Reich* demonstrates the importance of this requirement to provide a remedy, and the Court's recognition of the need to enforce it vigorously. The Georgia Supreme Court held in that case that a refund was not available under Georgia law because the taxpayer could have invoked a predeprivation remedy to challenge the unconstitutional levy. This Court reversed because state law had not appeared to make a predeprivation remedy available at the time the taxpayer paid the challenged tax. Although acknowledging a State's power to configure its remedial scheme, this Court said "what a State may not do * * * is to reconfigure its remedial scheme unfairly, in *mid-course* – to 'bait and switch' as some have described it," by retroactively limiting a state refund remedy. 513 U.S. at 111 (emphasis in original); see also *Newsweek*, 522 U.S. at 442 (per curiam) (applying *Reich* to overturn State's denial of a refund remedy).

In the wake of *McKesson* and *Reich* a number of state courts have refused to allow States to avoid their due process

remedial obligations by reconfiguring the postdeprivation remedy. For example, the Missouri Supreme Court held that requiring a parent and subsidiary to file dual returns in order to receive a refund did not cure a discriminatory rule against filing state consolidated income tax returns because the "dual filing option" was "an unknown and untested remedy" in that there was "no case or common practice in which it has been adopted or allowed" and therefore was "not a clear and certain remedy" under *McKesson*. *Eddie Bauer, Inc.* v. *Dir. of Revenue*, 70 S.W.3d 434, 438 (Mo. 2002).

A California court similarly rejected conditioning a refund on filing an additional application to describe in more detail the discriminatory nature of the taxation because it was impossible for the application to be timely for past tax years, and because "[i]t is unreasonable to require a taxpayer to produce documentation from 17 years ago that it was otherwise never required to maintain." *General Motors Corp.* v. *City & County of San Francisco*, 69 Cal. App. 4th 448, 455 (1999).

3. The decision below is starkly inconsistent both with this Court's decisions and with the approach taken by these other state courts. Rather than ordering a refund of "the difference between the tax [petitioners] paid and the tax [petitioners] would have been assessed" under the tax rate applicable to the favored class (*McKesson*, 496 U.S. at 40) – the conventional remedy in this type of situation – the court below ordered a *de novo* retroactive assessment of the fair market value of petitioners' interstate property during the relevant period. The *de novo* reassessment would use the method that applied to intrastate property, and then apply the lower tax rate to that new, inevitably higher assessed value.

Nothing in Louisiana law indicates that such a reassessment is a condition on the State's refund remedy. To the contrary, the limitations period for challenges to assessment of this property expired long ago, see La. Const. art. VII,

§ 16 (three-year statute of limitations), and neither petitioners nor respondent maintained a challenge to the assessments in the present litigation.

The court's ruling dramatically changes the refund remedy – from something that *was* "clear and certain" to something that is opaque and indefinite. Thus, as petitioners explain (Pet. 14), rather than obtaining a refund, they must participate in reappraisals in 52 different parishes for numerous individual tax years. These may produce over 1,500 separate hearings, followed by possible appeals to the Commission and then judicial review. See *ANR Pipeline Co.* v. *Louisiana Tax Comm'n*, 774 So.2d 1261, 1263 (La. 2000).

Moreover, because petitioners had no notice that such a reassessment might be required, they may not have preserved the relevant documentation. Certainly this process imposes very substantial costs and delays on petitioners – costs that will not be borne by the owners of the intrastate property who benefited under the unconstitutional tax scheme.

Finally, the reassessment cannot be defended on the ground that it is necessary to eliminate any unconstitutional discrimination. As the Court explained in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336, 343 (1989), "[t]hat two methods are used to assess property in the same class is, without more, of no constitutional moment." See also Pet. 20-21 (cases rejecting constitutional challenges based on use of different valuation methodologies). Petitioners here challenged only the discriminatory rates; the only logical cure for that constitutional violation was simply to equalize the rates.[2] Louisiana could attempt to enact a statute

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[2] Of course, if a taxpayer demonstrated that two assessment methods as actually applied produced consistently different results, constitutional principles could well be implicated. Thus, if the assessment method applicable to one class of property produced predictably more favorable assessments than the method applied to another class, there could be an equal protection violation. And if

providing that, in the future, when a taxpayer seeks a refund on the ground that tax rates are unconstitutionally discriminatory – and the fair market value of the two classes of property is calculated using different methodologies – any refund based on a lower tax rate is conditioned on a reassessment of the property using the assessment methodology applicable to that tax rate. See *McKesson*, 496 U.S. at 45 (States may limit their obligation to pay refunds by "impos[ing] various procedural requirements on actions for postdeprivation relief" of discriminatory taxes).[3]

What Louisiana may not do, however, is to change its refund system retroactively to incorporate this reassessment requirement and thereby impose illegitimate and unfair burdens on a taxpayer's ability to vindicate its due process rights. That involves the precise burden that was rejected by the Missouri Supreme Court in *Eddie Bauer* and the California appellate court in *General Motors*. This Court should grant review to resolve that conflict.

4. The issue presented here is extremely important. Because States "will often be able to collect an unconstitutional

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the disfavored class consisted of out-of-state entities, the disparity also could violate the Commerce Clause.

[3] Such a requirement would go beyond the procedural limitations that courts have thus far upheld, which involve much more even-handed and less burdensome requirements: limiting refunds to "those taxpayers paying under protest" (*McKesson* 496 U.S. at 45); short statutes of limitation for refunds (*ibid.*); paying refunds in installments (*ibid.*); and withholding interest on refunds (*e.g.*, *Williams* v. *Griffes*, 686 A.2d 964, 966 (Vt. 1996); *Pendell* v. *Dep't of Revenue*, 847 P.2d 846 (Ore. 1993); *Chicago Freight Car Leasing Co.* v. *Limbach*, 584 NE..2d 690 (Oh. 1992)). It therefore might well be invalid even if applied prospectively. Cf., *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 303 (1952).

tax during the lengthy period in which challenges to the tax are making their way through the courts," if the State "is free to hedge refund remedies with * * * many procedural hurdles," it will have to "refund only a small percentage of what it has collected" even if the tax ultimately is struck down. As a "consequence, states have little incentive to avoid enacting unconstitutional taxes." Coverdale, *Remedies*, *supra* at 80.

There already is a significant amount of litigation in state courts over the issue of retrospective remedies in cases involving unconstitutional taxes. Many of these cases involve *amici*'s members. See, *e.g.*, *Stonebridge Life Ins. Co.* v. *Dep't of Revenue*, 18 OTR 461 (Or. Tax Ct.2006); *City of Modesto* v. *National Med, Inc.*, 128 Cal. App. 4th 518 (2005) (local tax); *Aileen H. Char Life Interest* v. *Maricopa County*, 93 P.3d 486, 497-98 (Ariz. 2004); *State* v. *Carlson*, 65 P.3d 851, 871 (Al. 2003); *Eddie Bauer*, 70 S.W.3d 434; *PPG Indus.* v. *Bd. of Finance and Revenue*, 790 A.2d 261, 270 (Penn. 2001); *North Supply Co.* v. *Director of Revenue*, 29 S.W.3d 378 (Mo. 2000); *Ceridian Corp.* v. *Franchise Tax Bd.*, 85 Cal. App. 4th 875, 888-889 (2000); *General Motors Corp.*, 69 Cal. App. 4th at 455; *Yellow Freight Sys.* v. *State*, 585 N.W.2d 762, 766-67 (Mich. 1998).

If the decision below is permitted to stand, it is inevitable that other States will seize upon the approach taken by the court below to assert that they, too, are entitled to invent new case-specific restrictions on their refund remedy whenever a tax is found to be unconstitutional. Just as in *Reich* and in *Newsweek*, intervention by this Court is essential to address this important and frequently recurring issue.

B. The Decision Below Subjects The Natural Gas Industry To Significant Economic Burdens That Threaten To Increase Energy Costs, Reduce Pipeline Investment, And Thwart Achievement Of The Nation's Energy Policy Goals.

This case has especially important implications for the natural gas industry, because interstate pipelines – the principal mode of transportation for natural gas in interstate commerce – have been a frequent victim of discriminatory taxation schemes. The failure to return full refunds for taxes found to be discriminatory creates incentives for even more discrimination, and preserves their toll on energy prices, pipeline investment, and our nation's energy policy.

Once an interstate pipeline is built, and the pipeline owner has made a major investment in the State, "the pipeline owner is locked in and the bargaining power is in the hands of the state." *To Prevent Certain Discriminatory Taxation of Interstate Natural Gas Pipeline Property: Hearings Before the Subcomm. on Commercial and Administration Law of the H. Comm. on the Judiciary*, 109th Cong., 1st Sess. 13 (Oct. 6, 2005) (testimony of Veronique de Rugy, Research Fellow, American Enterprise Institute). As assets with significant upfront investment costs and very long lives, pipelines accordingly are a "prime target" for discriminatory taxation because "the States can effectively hold the pipeline investment hostage and extract a high tax payment." *Id.* at 12, 14. Because interstate pipeline companies typically are located out of state, and most of their employees therefore are not state residents, while their assets are permanently fixed in the taxing State, they "are high visibility targets for those States that think they can increase a tax and export it to their neighbor State." *Id.* at 28 (testimony of Laurence Garrett, Senior Counsel, El Paso Corporation Western Pipeline Group).

This discriminatory taxation imposes an enormous economic burden on the natural gas industry. Industry experts estimate that the "cumulative effect of these discriminatory tax policies is to increase the property tax bills of natural gas pipeline companies by more than 40 percent." *Id.* at 14 (de Rugy). In 2004, for example, natural gas pipeline companies paid $445 million in property tax, while they would have paid only $256 million if state tax laws treated pipeline companies in a nondiscriminatory fashion. *Ibid.* Providing full refunds through clear and certain means is a straightforward, indispensable way of reducing these economic burdens.

The effects of discriminatory taxation in Louisiana are multiplied because Louisiana plays a "pivotal role in the distribution of natural gas throughout the United States." *Id.* at 6 (testimony of Mark C. Schroeder, Vice President and General Counsel, CenterPoint Energy, Inc.'s Gas Pipeline Group). In 1999 alone, 19% of all natural gas in the United States was transported from or through Louisiana before reaching consumers. Therefore, "in 1999 Louisiana's discriminatory tax system affected approximately 19% of the national marketed [gas] production of the nation." *Id.* at 9. This importance will only increase as Louisiana hosts facilities for the importation of liquefied natural gas ("LNG") into the United States, which is projected to meet 24% of U.S. demand for natural gas by 2025. See Energy Information Administration, Dep't of Energy, *Annual Energy Outlook 2006 with Projections to 2030* 85-87 (Feb. 2006), *available at* http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2006).pdf.

To the extent Louisiana is able to impose discriminatory taxes and avoid its obligation to provide a remedy, the burden on the national economy is significant. Of course, that burden will grow as other States attempt to use the same techniques to try to retain unlawful tax levies.

Discriminatory taxation of interstate pipelines does not just affect pipeline companies – it also raises consumers'

natural gas bills and, indeed, the costs of many other products, including electricity. Interstate pipeline companies are subject to cost of service regulation by the Federal Energy Regulatory Commission. Natural Gas Act, 15 U.S.C. §§ 717-717(w). When an interstate pipeline company seeks adjustment to its rates, taxes paid are included as an element of that cost of service. Thus, Louisiana's discriminatory taxation results in "higher costs for natural gas for consumers who must rely on interstate natural gas pipelines for the delivery of the natural gas." *Id.* at 7 (Schroeder).[4] And because the burden of higher gas prices falls on every consumer, it disproportionately injures poorer people. See *id.* at 32 (de Rugy).

Failure to provide remedial relief also reduces incentives to invest in the pipelines that our Nation needs to ensure that energy supplies will be available in the future, and that the natural gas system is robust enough to maintain reliable service during periods of stress. "State tax policies do enter into the decision making process in determining to proceed with major capital projects" to build and expand natural gas pipelines. *Id.* at 31 (Garrett). Discriminatory taxation increases pipelines' costs, reducing funds available for investment in new pipelines and maintenance of existing equipment. See *id.* at 14 (de Rugy). The prospect of discriminatory taxation also reduces pipeline owners' expected rate of return on new pipelines, further discouraging new investment in the United States in favor of investment in other locations. *Ibid.*

Lack of investment and delay in building new pipelines, and in maintaining existing pipelines, would impose enormous costs on the national economy. U.S. industry depends on natural gas for 27% of its primary energy consumption, and that reliance is expected to increase. *Id.* at 15 (de Rugy).

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[4] Sixty-two percent of American homes use natural gas. See *id.*, at 12 (de Rugy).

Massive investment in pipelines, storage facilities, and liquefied natural gas terminals will be required to meet this demand. *Ibid.* Anything that reduces incentives to undertake this huge investment will impose costs – in the form of higher gas prices – on businesses and consumers. Thus, the cost of even a two-year delay in building natural gas infrastructure would cost U.S. natural gas consumers in excess of $200 billion by 2020.[5] Every consumer will pay higher pries for natural gas, electricity, and the goods produced using natural gas without the appropriate incentives to maintain and increase investment in pipelines.

Not surprisingly, therefore, expansion of the natural gas pipeline network is a key component of the Nation's energy policy. President Bush has stated that "expanding our domestic production of oil and natural gas" is vital to energy policy. Pres. George W. Bush, Address at the Signing of the Energy Policy Act, Sandia National Laboratory, Albuquerque, NM (Aug. 8, 2005)[6]; see also *Natural Gas on Public Lands: Hearings Before the Subcomm. on Energy and Mineral Resources at the H. Comm. on Resources*, 107th Cong., 2nd Sess. (July 16, 2002) (testimony of Rebecca W. Watson, Asst. Sec'y for Land & Minerals Mgmt., U.S. Dep't of the Interior) ("Natural gas is an important cornerstone" of the national energy policy); H. Sterling Burnett, *Shaping a Progressive Energy Policy: Natural Gas*, National Center for Policy Analysis Brief No. 434 (2003), at 1 (Lowering barriers to the expansion and modernization of natural gas pipelines is "[c]ritical to a sound national energy policy."). Weakening the protections against discriminatory taxation, as

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[5] See *Avoiding and Resolving Intergovernmental Conflicts with Interstate Natural Gas Facility Siting, Construction, and Maintenance*. The INGAA Foundation (Mar., 2005), *available at* http://tinyurl.com/j7ojx.

[6] *Available at*, http://www.whitehouse.gov/news/releases/2005/08/20050808-6.html

the court below has done in this case, threatens to deter the very investment that our Nation needs to meet its energy challenges.

This Court should grant review in order to eliminate this unjustified burden on consumers, interstate commerce, and implementation of our national energy policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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